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**MAR 17 2010**

In re Application of :  
Keene :  
Application No. 10/623,936 :  
Filed: 21 July, 2003 :  
Attorney Docket No. 5-904 :  
DECISION

This is a decision on the petition filed on 5 January, 2010, pursuant to 37 C.F.R. §1.137(b) for revival of an application abandoned due to unintentional delay.

The petition under 37 C.F.R. §1.137(b) is **GRANTED**.

**As to the Allegations  
of Unintentional Delay**

The requirements of a grantable petition pursuant to 37 C.F.R. §1.137(b) are the petition and fee therefor, a reply, a proper statement of unintentional delay under the regulation, and, where applicable, a terminal disclaimer and fee. (However, it does not appear that a terminal disclaimer and fee are due here.)

*The attentions of Petitioner always are directed to the guidance in the Commentary at MPEP §711.03(c)(II).*

**BACKGROUND**

The record reflects as follows:

Former Counsel/then-Petitioner failed to reply timely and properly to the final Office action mailed on 28 June, 2005, with reply due absent an extension of time on or before 28 September, 2005;

The application went abandoned after midnight 28 September, 2005;

The Office mailed the Notice of Abandonment on 2 February, 2006;

On 18 March, 2006, former Counsel/then-Petitioner filed a petition pursuant to 37 C.F.R. §1.181 to withdraw the holding of abandonment, but included therewith only an averment that Petitioner timely filed the reply in question and copies of the papers averred to have been timely filed—in so doing, former Counsel/then-Petitioner appeared to have ignored the requirements set forth at MPEP '711.03(c). The petition was dismissed on 11 April, 2006, with an 11 June, 2006, due date for any further petition by former Counsel/then-Petitioner and/or Applicant.

It appears that a 31 December, 2007, Revocation/Power of Attorney was entered/acknowledged on 14 January, 2008, and the acknowledgement thereof returned to the Office on 22 January, 2008.

A subsequent Revocation/Power of Attorney was filed on 6 May, 2009.

On 19 August, 2009, Petitioner filed a petition pursuant to 37 C.F.R. §1.137(b), with fee, a reply in the form of a request for continued examination (RCE) with fee and submission in the form of an amendment pursuant to 37 C.F.R. §1.114, and made a statement of unintentional delay—however, it did not appear that Petitioner was the person in whose control the application at the time of abandonment and there was no showing provided as to the factual basis for the averred unintentional delays that occurred after midnight 28 September, 2005, and after midnight 11 June, 2006, (the reply due date for any renewed petition following the 11 April, 2006, decision). The petition was dismissed on 7 December, 2009.

On 5 January, 2010, Petitioner filed a petition pursuant to 37 C.F.R. §1.137(b), with fee, pointed to the previously filed reply and made a showing of unintentional delay through an extended statement by the Applicant.

Petitioners' attentions always are directed to the guidance in the Commentary at MPEP §711.03(c )(II).

The record (including the petitions filed on 15 March, 2006, on 19 August, 2009, and on 5 January, 2010) does not necessitate a finding that the delay between midnight 28 September, 2005 (the date of abandonment), and 5 January, 2010 (the date of the filing of grantable petition), was not unintentional.

Rather, the Patent and Trademark Office is relying in this matter on the duty of candor and good faith of Petitioner/Applicant James R. Keene and Counsel Neil A. DuChez (Reg. No. 26,725) when accepting Petitioners' representation that the delay in filing the response was unintentional.<sup>1</sup>

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<sup>1</sup> See Changes to Patent Practice and Procedure, 62 Fed. Reg. at 53160 and 53178, 1203 Off. Gaz. Pat. Office at 88 and 103 (responses to comments 64 and 109)(applicant obligated under 37 C.F.R. '10.18 to inquire into the underlying facts and circumstances when providing the statement required by 37 C.F.R. '1.137(b) to the Patent and Trademark Office).

The availability of applications and application papers online to applicants/practitioners who diligently associate their Customer Number with the respective application(s) now provides an applicant/practitioner on-demand information as to events/transactions in an application.

Out of an abundance of caution, Petitioners always are reminded that those registered to practice and all others who make representations before the Office **must** inquire into the underlying facts of representations made to the Office and support averments with the appropriate documentation—since all owe to the Office the continuing duty to disclose.<sup>2</sup>

### STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).<sup>3</sup>

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a Petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority.

Unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.<sup>4</sup>)

#### As to Allegations of Unintentional Delay

The requirements of a grantable petition pursuant to 37 C.F.R. §1.137(b) are the petition and fee therefor, a reply, a proper statement of unintentional delay under the regulation, and, where applicable, a terminal disclaimer and fee.

It appears that the requirements under the rule have been satisfied.

### CONCLUSION

Accordingly, the petition pursuant to 37 C.F.R. §1.137(b) is **granted**.

<sup>2</sup> See supplement of 17 June, 1999. The Patent and Trademark Office is relying on petitioner's duty of candor and good faith and accepting a statement made by Petitioner. See Changes to Patent Practice and Procedure, 62 Fed. Reg. at 53160 and 53178, 1203 Off. Gaz. Pat. Office at 88 and 103 (responses to comments 64 and 109)(applicant obligated under 37 C.F.R. §10.18 to inquire into the underlying facts and circumstances when providing statements to the Patent and Trademark Office).

<sup>3</sup> 35 U.S.C. §133 provides:

**35 U.S.C. §133 Time for prosecuting application.**

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

<sup>4</sup> Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

The instant application is released to the Technology Center/AU 3600/3635 for further processing in due course.

Petitioner may find it beneficial to view Private PAIR within a fortnight of the instant decision to ensure that the revival has been acknowledged by the TC/AU in response to this decision. It is noted that all inquiries with regard to that change in status need be directed to the TC/AU where that change of status must be effected—that does not occur in the Office of Petitions.

Telephone inquiries regarding this decision may be directed to the undersigned at (571) 272-3214—it is noted, however, that all practice before the Office is in writing (see: 37 C.F.R. §1.2<sup>5</sup>) and the proper authority for action on any matter in this regard are the statutes (35 U.S.C.), regulations (37 C.F.R.) and the commentary on policy (MPEP). Therefore, no telephone discussion may be controlling or considered authority for Petitioner's action(s).

/John J. Gillon, Jr./  
John J. Gillon, Jr.  
Senior Attorney  
Office of Petitions

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<sup>5</sup> The regulations at 37 C.F.R. §1.2 provide:

**§1.2 Business to be transacted in writing.**

All business with the Patent and Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.